

1 ADAM PAUL LAXALT  
2 Attorney General  
3 ERIN L. BITTICK (Bar. No. 13827)  
4 Deputy Attorney General  
5 State of Nevada  
6 Office of the Attorney General  
7 100 North Carson Street  
Carson City, NV 89701-4717  
(775) 684-1215 (phone)  
(775) 684-1108 (fax)  
ebittick@ag.nv.gov  
*Attorneys for Respondents*

8  
9 **UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

10 KENNETH THOMAS,

Case No. 3:15-cv-00071-MMD-WGC

11 Petitioner,

**MOTION TO DISMISS**

12 vs.

13 D.W. NEVEN, *et al.*,

14 Respondents

15 Respondents move to dismiss Kenneth Thomas's (Thomas) first amended petition for a writ of  
16 habeas corpus (amended petition). ECF No. 40. The amended petition contains claims that are  
17 untimely and/or unexhausted. This motion is made pursuant to the following memorandum of points  
18 and authorities, together with all other pleadings, papers, and exhibits on file herein.

19 **STATEMENT OF THE CASE<sup>1</sup>**

20 **I. State Court Proceedings**

21 On August 12, 2008, Thomas was charged by way of Grand Jury Indictment in the Eighth  
22 Judicial District Court of Nevada with seven criminal counts: Count I - burglary while in possession of  
23 a firearm; Count II - Murder with use of a deadly weapon, victim 60 years of age or older; Count III -  
24 Conspiracy to commit murder; Count IV - First degree kidnapping with use of a deadly weapon, victim  
25 60 years of age or older; Count V - Conspiracy to commit kidnapping; Count VI - Robbery with use of  
26 a deadly weapon, victim 60 years of age or older; and Count VII - Conspiracy to commit robbery. ECF

27  
28 <sup>1</sup> Respondents deny all factual allegations in the petition except for those expressly found to be true by a Nevada  
Court of competent jurisdiction.

1 No. 21-7. The Grand Jury lodged identical charges against Thomas's two co-defendants, David Jones  
 2 (Jones) and Simone Taylor (Taylor). ECF No. 21-5.

3 On September 12, 2008, the State filed its notice of intent to seek the death penalty against  
 4 Thomas. ECF No. 21-12.

5 Thomas plead guilty as charged in the indictment. ECF No. 23-16. In exchange for his guilty  
 6 plea, the State agreed to not seek the death penalty, but otherwise retained "the right to argue" for any  
 7 lawful sentence. *Id.* at 2.

8 The state district court sentenced Thomas to life without the possibility of parole for his murder  
 9 conviction. ECF No. 23-20 at 2. The court imposed various consecutive sentences for Thomas's six  
 10 remaining convictions. *Id.* at 2–3. The court entered the judgment of conviction on April 18, 2011. *Id.*

11 Thomas did not file a direct appeal. *See* ECF No. 40 at 1.

12 On July 8, 2011, Thomas moved to withdraw his guilty plea. ECF No. 23-21. The state district  
 13 court rejected Thomas's motion, stating he needed "to file a Writ." ECF No. 23-24. On December 14,  
 14 2011, Thomas filed his second motion to withdraw his guilty plea. ECF No. 24-1. The court once  
 15 again denied Thomas's motion, noting its previous order. ECF No. 24-4.

16 On March 13, 2012, Thomas filed a notice of appeal to the Nevada Supreme Court from the  
 17 court's denial of his second motion to withdraw guilty plea. ECF Nos. 24-6, 24-13.<sup>2</sup> The Nevada  
 18 Supreme Court dismissed the appeal as untimely. ECF No. 24-13.

19 On March 28, 2012, Thomas filed his first state petition for writ of habeas corpus. ECF No.  
 20 24-12. With the assistance of counsel, Thomas filed supplemental points and authorities in support of  
 21 his state petition. ECF No. 24-18. The court held two hearings to consider Thomas's original and  
 22 supplemental state petitions, including an evidentiary hearing on June 14, 2013. ECF Nos. 25-3, 25-12.  
 23 After considering the pleadings and evidence, the state district court denied Thomas's state petition on  
 24 the merits. ECF No. 25-19.

25 Thomas appealed the state district court's decision to the Nevada Supreme Court. ECF No.  
 26 25-23.<sup>3</sup> On appeal, Thomas raised three grounds for review:

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27 <sup>2</sup> Nevada Supreme Court Case No. 60459.  
 28 <sup>3</sup> Nevada Supreme Court Case No. 63801.

1                   A. The plea canvass of petitioner was constitutionally defective under  
2                   the 5th and 14th Amendments of the Constitution of the United States.

3                   B. The plea canvass of petitioner was defective as to Count 2 of the  
4                   indictment.

5                   C. Petitioner was denied his constitutional right to the effective  
6                   assistance of counsel as guaranteed under the 6th and 14th Amendments  
7                   of the Constitution of the United States.

8                   ECF No. 26-15. The Nevada Supreme Court affirmed the state district court's decision. ECF No.  
9                   26-22. Remittitur issued on January 6, 2015. ECF No. 26-23.

10                  Thereafter, Thomas filed two motions to withdraw guilty plea. ECF Nos. 27-1, 27-3. The state  
11                  district court denied the motions. ECF No. 27-14. Thomas appealed. ECF No. 27-10.<sup>4</sup> The Nevada  
12                  Supreme Court reversed and remanded, directing the state district court to consider Thomas's motions  
13                  as a post-conviction petition for writ of habeas corpus and to provide him an opportunity to cure any  
14                  procedural defects. ECF No. 27-18.

15                  On May 19, 2016, Thomas filed a *pro per*, "supplemental" state habeas petition. Exhibit 172.<sup>5</sup>  
16                  The state district court denied Thomas's second habeas petition as procedurally barred. Exhibit 177.

17                  Thomas appealed. Exhibit 175.<sup>6</sup> On appeal, he alleged the state district court erred in denying  
18                  his "supplemental" state habeas petition as Thomas's plea was not knowingly and voluntarily entered.  
19                  Exhibit 181. On July 12, 2017, the Nevada Court of Appeals affirmed the district court's dismissal,  
20                  finding the petition untimely pursuant to Nev. Rev. Stat. 34.726 and successive pursuant to Nev. Rev.  
21                  Stat. 34.810. Exhibit 184. Remittitur issued on August 9, 2017. Exhibit 185.

22                  **II. Federal Court Proceedings**

23                  On January 28, 2015, Thomas mailed, or handed to a prison official for the purpose of mailing,  
24                  his federal petition for writ of habeas corpus (federal petition). ECF No. 1-1. Thomas raised four  
25                  grounds for review in his federal petition:

26                  1. Thomas's plea was not voluntary and intelligent. (ECF No. 1-1 at 5).  
27                  2. Ineffective assistance of counsel. (ECF No. 1-1 at 7).

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28                  <sup>4</sup> Nevada Supreme Court Case No. 68416.

<sup>5</sup> Respondents' supplemental index of exhibits filed concurrently herewith.

<sup>6</sup> Nevada Supreme Court Case No. 71452.

1           3. Thomas has suffered manifest injustice because he was sentenced for  
 2           a crime he was never found guilty of, or plead guilty too and thus, the  
 3           sentencing court was without jurisdiction to impose sentence. (ECF No.  
 4           1-1 at 9).

5           4. There was a conflict of interest in Thomas's case with the (SPDO).<sup>7</sup>  
 6           (ECF No. 1-1 at 11).

7           After reviewing Thomas's original filings, this Court appointed counsel and issued a scheduling order  
 8           to allow for filing of an amended petition. ECF No. 8; ECF No. 10. On July 6, 2016, Thomas's federal  
 9           counsel filed a notice stating "counsel will not be filing any amendment on behalf of petitioner." ECF  
 10           No. 18.

11           Respondents moved to dismiss Ground 4 of the federal petition as conclusory and unexhausted.  
 12           ECF No. 19. Thomas's counsel opposed the motion, and Respondents replied. ECF Nos. 30, 31.

13           Thomas also filed a *pro per* supplement to his petition. ECF No. 29. Respondents moved to  
 14           strike the supplement. ECF No. 29. Thereafter, Thomas, in *pro per*, moved for the appointment of new  
 15           counsel to allow him to file an amended petition. ECF No. 33.

16           This Court granted Thomas's motion for appointment of new counsel. ECF No. 36 at 4. This  
 17           Court also granted Respondent's motion to strike the supplement and denied the motion to dismiss  
 18           without prejudice pending the filing of an amended petition by new counsel. *Id.*

19           Following appearance of new counsel, on February 2, 2018, Thomas filed a counseled, first  
 20           amended petition. Thomas raises the following claims:

21           **Ground 1(1):** Thomas's guilty plea was not knowingly, intelligently, or  
 22           voluntarily entered because the guilty plea canvas was not individualized.  
 23           (ECF No. 40 at 8-9).

24           **Ground 1(2):** Thomas's guilty plea was not knowingly, intelligently, or  
 25           voluntarily entered because the guilty plea canvas was not complete.  
 26           (ECF No. 40 at 9-11).

27           **Ground 2:** Trial counsel was ineffective for various reasons.

28           (1) Counsel failed to advise the trial court of Thomas' mental  
 29           deficiencies at the time the plea was taken, failed to wait until  
 30           the psychological report was completed prior to entering the  
 31           plea, and failed [to] utilize any of the steps recommended by  
 32           the expert to help Thomas understand the plea process. (ECF  
 33           No. 40 at 11-13).

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7 Respondents presume Thomas is referring to the Special Public Defender's Office in Clark County. See ECF No. 19 at 5, n. 2.

- 1 (2) Counsel failed to challenge the death penalty as a potential  
2 penalty prior to entry of the plea agreement. (ECF No. 40 at  
3 13–15).
- 4 (3) Trial counsel failed to file a notice of appeal. (ECF No. 40 at  
5 15–16).
- 6 (4) Trial counsel misrepresented the sentence. (ECF No. 40 at  
7 17).
- 8 (5) Trial counsel misrepresented the role of an investigator. (ECF  
9 No. 40 at 17–18).
- 10 (6) Trial counsel failed to correct erroneous information relied on  
11 by the trial court in determining Thomas' sentence at  
12 sentencing. (ECF No. 40 at 18–22).

13 Respondents now move to dismiss Grounds 2(2) and 2(6) as they are untimely and/or  
14 unexhausted.

## 15 ARGUMENT

### 16 **I. Grounds 2(2) and 2(6) Of the Amended Petition Do Not Relate Back To The Originally 17 Timely-Filed Petition.**

18 Grounds 2(2) and 2(6) of the amended petition do not relate back to the original timely-filed  
19 petition and should therefore be dismissed as untimely.

20 The United States Supreme Court significantly limited a habeas petitioner's ability to "relate  
21 back" amended claims to the filing of the original petition to be considered timely under 28 U.S.C. §  
22 2244(d). *Mayle v. Felix*, 545 U.S. 644, 650 (2005). In *Mayle*, the Court held that the Ninth Circuit's  
23 former relation-back standard under Federal Rule of Civil Procedure 15(c), which allowed an  
24 amendment to a habeas petition to "relate back" to the date of the original petition "so long as the new  
25 claim stems from the habeas petitioner's trial, conviction or sentence," was too broad. *Id.* at 656. An  
26 amended claim in a habeas petition relates back only if it shares a "common core of operative facts"  
27 with claims contained in the original petition. *Id.* at 664. A new claim does not relate back simply  
because it arises from the same trial, conviction or sentence. *Id.* at 662-64. An amended habeas petition  
"does not relate back (and thereby escape AEDPA's one-year time limit) when it asserts a new ground  
for relief supported by facts that differ in both time and type from those the original pleading set forth."  
*Id.* at 650.

28 While theories may share a common fact, the facts underlying both the original and amended

1 claims must arise from a common *core* of operative facts. *Schneider v. McDaniel*, 674 F.3d 1144, 1151  
 2 (2012) (emphasis in original).

3 Thomas's amended petition is untimely as it was not filed within the one-year statute of  
 4 limitations period under AEDPA. The one-year period of limitations expired on June 9, 2015.<sup>8</sup> 28  
 5 U.S.C. § 2244(d)(1)(A).

6 Thomas filed his amended petition on February 2, 2018, nearly two years after the statute of  
 7 limitations period under AEDPA expired and after mailing his original federal petition. As outlined  
 8 below, the claims raised in the untimely, amended petition do not relate back to the original petition  
 9 filed by Thomas.

10 **A. Ground 2(2) Does Not Relate Back.**

11 A comparison of Ground 2(2) of the amended petition to the original petition reveals it is based  
 12 on a new and different “core of operative facts” from the original petition.

13       <sup>8</sup> The court filed the judgment of conviction on April 18, 2011. ECF No. 23-20. Thomas did not file a direct  
 14 appeal. *See* ECF No. 40 at 1. Therefore, the date of finality occurred thirty days later, on May 18, 2011. Thomas filed a  
 15 motion to withdraw guilty plea on July 8, 2011, or 51 days later. *See* ECF No. 23-21. The motion remained pending until  
 16 September 9, 2011, when the state district court denied the motion. *See* ECF No. 23-24. Thomas did not appeal.

17 Instead, he filed a second motion to withdraw guilty plea on December 14, 2011, or 96 days later. ECF No. 24-1.  
 18 The state district court denied the second motion on January 24, 2012, and Thomas appealed. ECF No. 24-4. However, the  
 19 Nevada Supreme Court dismissed the appeal based on lack of jurisdiction. ECF No. 24-13. Thus, the time the second  
 20 motion remained pending was only statutorily tolled for the 41 days the motion remained pending in state district court. *See*  
 21 *Seydewitz v. Neven*, 2015 WL 4774002, at \*4 (D. Nev. Aug. 13, 2015) (“Because petitioner never properly filed an appeal  
 22 from the denial of his motion, the AEDPA statute of limitations was tolled only for the [time] that the motion was pending  
 23 in the state district court.”).

24 Thomas filed his state habeas petition on March 28, 2012, or 64 days later. ECF No. 24-12. The Nevada Supreme  
 25 Court’s remittitur on appeal of the state habeas petition issued January 6, 2015. ECF No. 26-23. The AEDPA statute of  
 26 limitations expired 154 days later, on June 9, 2015. Thomas filed his timely original petition on January 28, 2015. ECF No.  
 27 1-1.

28 Even assuming *arguendo* that the entire time the second motion to withdraw guilty plea remained pending was  
 29 statutorily tolled, Thomas’s amended federal petition is nonetheless still untimely. He filed his second motion on December  
 30 14, 2011, or 96 days after the finality of the first motion. *See* ECF No. 24-1. The second motion remained pending until  
 31 remittitur issued on June 11, 2012. *See* ECF No. 24-15. The one-year limitations period began to run again on January 6,  
 32 2015, when remittitur issued on appeal of Thomas’s state habeas petition. *See* ECF No. 26-23. Therefore, if the second  
 33 motion was statutorily tolled for the entire period it remained pending, the AEDPA statute of limitations would have expired  
 34 on August 12, 2015, or 218 days later. Thomas did not file his amended petition until February 2, 2018.

35 While Thomas filed a second state habeas petition, the Nevada Court of Appeals affirmed the district court’s  
 36 findings that the grounds raised in Thomas’s second state habeas petition were procedurally barred pursuant to Nev. Rev.  
 37 Stats. 34.726 and 34.810 and Thomas failed to establish good cause to overcome the procedural default. Exhibit 184. Thus,  
 38 the period of time Thomas’s second state habeas petition was pending was not statutorily tolled. *See Pace v. DiGuglielmo*,  
 39 544 U.S. 408, 414 (2005).

1       In Ground 2(2) of the amended petition, Thomas alleges trial counsel was ineffective for failing  
2 to challenge the death penalty as a possible penalty prior to entry of the plea agreement. ECF No. 40  
3 at 13–15. In support of Ground 2(2), the amended petition alleges trial counsel failed to file a motion  
4 to invalidate the death penalty as a potential penalty due to Thomas’s cognitive abilities. *Id.*

5       While the original petition contained numerous allegations regarding Thomas’s cognitive  
6 abilities, none of the allegations in the amended petition regarding trial counsel’s motion practice, or  
7 lack thereof, were either referred to in the original petition, or referred to with the specific factual basis  
8 now raised in the amended petition. *See* ECF No. 1-1. Moreover, Thomas did not raise any allegations  
9 in his original petition regarding a challenge to the death penalty. *See id.*

10      Therefore, the claims of Ground 2(2) of the amended petition regarding counsel’s failure to file  
11 a motion to challenge the death penalty do not relate back under *Mayle* and are therefore untimely.

12      **B. Ground 2(6) Does Not Relate Back.**

13      The claims in Ground 2(6) of the amended petition arise from a new and different “core of  
14 operative fact” from the original petition.

15      In Ground 2(6) of the amended petition, Thomas alleges trial counsel was ineffective for failing  
16 to correct allegedly erroneous information relied on by the sentencing court in imposing his sentence.  
17 ECF No. 40 at 18. In support of Ground 2(6), Thomas alleges the sentencing court believed Thomas  
18 was on probation when it imposed his sentence. None of these allegations in the amended petition  
19 regarding the information relied on by the sentencing court were referred to in the original petition. *See*  
20 ECF No. 1-1. Therefore, the claims of Ground 2 of the amended petition do not relate back under  
21 *Mayle* and are therefore untimely.

22      Grounds 2(2) and 2(6) of the amended petition do not relate back to the filing of the original,  
23 timely petition. The two grounds are therefore untimely and should be dismissed.

24      **II. Grounds 2(2) And 2(6) Are Unexhausted And Should Be Dismissed.**

25      Pursuant to 28 U.S.C. § 2254(b)(1)(A), a federal court may not grant “a writ of habeas corpus  
26 on behalf of a person in custody pursuant to the judgment of a State court . . . unless it appears . . . the  
27 applicant has exhausted the remedies available in the courts of the State. . . .” The exhaustion  
28 requirement—sometimes referred to as fair presentation—is a matter of comity designed to afford state

1 courts the first opportunity to remedy a constitutional violation. *Greene v. Lambert*, 288 F.3d 1081,  
 2 1088 (9th Cir. 2002).

3 To satisfy exhaustion, each of the petitioner's claims must have been previously presented to  
 4 the Nevada Supreme Court with references to a specific federal constitutional guarantee, as well as a  
 5 statement of facts that entitle the petitioner to relief. *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir.  
 6 2002). “If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional  
 7 claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court.”  
 8 *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1997); *see also Lyons v. Crawford*, 232 F.3d 666, 670  
 9 (9th Cir. 2000), *as modified by* 247 F.3d 904 (9th Cir. 2001) (“[A] petitioner for habeas corpus relief  
 10 under 28 U.S.C. § 2254 exhausts available state remedies only if he characterized the claims he raised  
 11 in state proceedings *specifically* as federal claims.”) (emphasis in original). “The mere similarity  
 12 between a claim of state and federal error is insufficient to establish exhaustion.” *Vang v. Nevada*, 329  
 13 F.3d 1069, 1075 (9th Cir. 2003) (quoting *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999)).

14 A petitioner is required to make “a fair presentation” of his federal claims to the state courts.  
 15 “Fair presentation requires that a state’s highest court has a ‘fair opportunity to consider [an appellant’s  
 16 constitutional claim] and to correct that asserted constitutional defect.’” *Lounsbury v. Thompson*, 374  
 17 F.3d 785, 787–88 (9th Cir. 2004) (citations omitted). This means that claims presented in a  
 18 procedurally improper manner such that the state court did not have a fair opportunity to consider their  
 19 merits are unexhausted. *See Castille v. Peoples*, 489 U.S. 346, 351 (1989) (holding that exhaustion  
 20 cannot be achieved by procedurally deficient or improper means); *McQuoun v. McCartney*, 795 F.2d  
 21 807, 809 (9th Cir. 1986) (stating that a claim is exhausted only when it has been presented in a way that  
 22 provides the state courts with an opportunity to rule on its merits).

23 By failing to exhaust the claims contained in Grounds 2(2) and 2(6) of his amended petition,  
 24 Thomas failed to give Nevada courts the “opportunity to pass upon and correct alleged violations of  
 25 [his] federal rights.” *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (internal citations omitted).

26 **A. Grounds 2(2) and 2(6)**

27 In Ground 2(2), Thomas alleges trial counsel was ineffective for failing to challenge the death  
 28 penalty as a potential penalty prior to entry of the plea agreement. ECF No. 40 at 13–15. He alleges in

1 Ground 2(6) that trial counsel was ineffective for failing to correct the allegedly erroneous information  
2 relied on by the sentencing court in imposing Thomas's sentence. ECF No. 40 at 18–22.

3 While Thomas raised ineffective assistance of trial counsel claims in his first state habeas  
4 action, he did not raise the claims contained in Grounds 2(2) and 2(6) that trial counsel was ineffective  
5 for failing to challenge the death penalty and for failing to correct the allegedly erroneous information  
6 relied on by the sentencing court before either the Nevada Supreme Court or the Nevada Court of  
7 Appeals. *See* ECF No. 140. Moreover, Thomas did not raise any ineffective assistance of trial counsel  
8 claims in his second state habeas petition. *See* Exhibits 181, 184.

9 Grounds 2(2) and 2(6) are unexhausted and must be dismissed. *See Koerner*, 328 F.3d at 1046.

10 **B. This Court should apply the doctrine of anticipatory default to Thomas's unexhausted  
11 claims.**

12 Where a state procedural default clearly applies to an otherwise unexhausted claim, the claim  
13 may be considered “technically exhausted” under the doctrine of anticipatory default. *Dickens v. Ryan*,  
14 740 F.3d 1302, 1317 (9th Cir. 2014) (“An unexhausted claim will be procedurally defaulted, if state  
15 procedural rules would now bar the petitioner from bringing the claim in state court.”). As  
16 Respondents note *supra*, Thomas failed to fairly present many of the claims in Grounds 2(2) and 2(6)  
17 of the amended petition to the Nevada Supreme Court or the Nevada Court of Appeals. The Nevada  
18 Court of Appeals affirmed the district court’s dismissal of Thomas’s second state petition as untimely.  
19 Exhibit 184. Thus, if Thomas concedes he has no additional arguments to overcome Nevada’s  
20 procedural defaults, this Court should apply the doctrine of anticipatory default and procedurally bar  
21 Thomas’s unexhausted claims pursuant to Nev. Rev. Stat. 34.726.

22 **C. Thomas presents an improper mixed petition for this Court’s review.**

23 A federal court should not entertain a petition for writ of habeas corpus unless the petitioner has  
24 exhausted available and adequate state court remedies with respect to each of the claims contained in  
25 the petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A “mixed” petition containing both exhausted  
26 and unexhausted claims is subject to dismissal. *Id.* Thomas presents a mixed amended petition to this  
27 Court for its review. ECF No. 40. Accordingly, Thomas’s amended petition cannot move forward in  
28 its current form. *Rose*, 455 U.S. at 510.

## CONCLUSION

Based on the foregoing, Grounds 2(2) and 2(6) of Thomas's amended petition should be dismissed as untimely and/or unexhausted.

RESPECTFULLY SUBMITTED this 16th day of March, 2018.

ADAM PAUL LAXALT  
Attorney General

By: /s/ Erin L. Bittick  
ERIN L. BITTICK (Bar. No. 13827)  
Deputy Attorney General

## **CERTIFICATE OF SERVICE**

I certify that I am an employee of the Office of the Attorney General and that on this 16th day of March, 2018, I served a copy of the foregoing **MOTION TO DISMISS**, by U.S. District Court CM/ECF electronic filing to:

RESCH LAW, PLLC d/b/a Conviction Solutions  
By: Jamie J. Resch  
Nevada Bar Number 7154  
2620 Regatta Dr., Suite 102  
Las Vegas, Nevada, 89128  
Telephone (702) 483-7360  
Facsimile (800) 481-7113  
Jresch@convictionsolutions.com

/s/ Amanda White